No. 90-5721

IN THE

Supreme Court of the United States

October Term, 1990

PERVIS TYRONE PAYNE,

Petitioner,

v.

TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

BRIEF OF *AMICI CURIAE* HON. THOMAS J. BLILEY, JR., *ET AL.* IN SUPPORT OF RESPONDENT

Frank G. Carrington*
4530 Ocenfront
Virginia Beach, Virginia 23451

Michael J. Lockerby
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

David E. Anderson
U.S. House of Representatives
Committee on the
District of Columbia
Room 1310, Longworth House
Office Building
Washington, DC 20515

Counsel for *Amici Curiae*
*Counsel of Record

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INTEREST OF THE AMICI CURIAE

Amici are Members of the United States House of Representatives and the United States Senate. Amici's interest in this case is prompted by the fact that Congress has enacted various pieces of legislation intended to ensure that the impact of the crime on the victim is considered at sentencing, including in capital cases. Amici respectfully submit that nothing in the Eighth Amendment warrants overriding the legislative determination that crime victims have the right to be heard in capital cases. Therefore, Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989) ought to be overruled.

INTRODUCTION AND SUMMARY OF ARGUMENT

A jury of his peers sentenced Pervis Tyrone Payne to die for the first degree murder of 28 year old Charisse Christopher and her two and a half year old daughter Lacie.[1/] The issue before this Court is whether the jury's verdict must be overturned because the jury heard testimony regarding the effect of the murders on three and a half year old Nicholas Christopher,

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[1/] Charisse sustained 42 knife wounds. Tests of a specimen from her vagina were consistent with the presence of semen, and police found a used tampon on the floor near her knee. Charisse's murdered daughter Lacie, two and a half years old, was stabbed nine times in the chest, abdomen, back and head.

whom Payne stabbed and left for dead.[2] The testimony at issue consists of the following:

> He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He come to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell yes. He says, I'm worried bout my Lacie.

The foregoing testimony no doubt can be distinguished from the victim impact statement which, in Booth, this Court held violative of the Eighth Amendment. No doubt this Court can also distinguish the State's closing argument regarding the foregoing testimony[3] from the prosecutorial comment

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[2] Nicholas Christopher survived multiple lacerations and several stab wounds that went completely through his body from front to back. Saving Nicholas' life required seven hours of surgery and a transfusion of 1700 cc's of blood -- 400 to 500 cc's more than his estimated normal blood volume.

[3] The prosecutorial comment that Petitioner contends violated Booth and Gathers included the following:

> But we do know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and to his baby sister.

791 S.W.2d at 18. The victim impact commentary which Petitioner contends is "cruel and unusual punishment" in violation of the Eighth Amendment also included the following statement by the prosecutor:

> ... And there won't be anybody there -- there won't be his mother there or Nicholas' mother there to kiss him at night.
>
> (continued...)

held objectionable in Gathers. Indeed, the Supreme Court of Tennessee was able to distinguish both Booth and Gathers in affirming the jury's verdict sentencing Payne to death:

> We are of the opinion that the prosecutor's argument is relevant to this defendant's personal responsibility and moral guilt. When a person deliberately picks a butcher knife out of a kitchen drawer and proceeds to stab to death a twenty-eight year old mother, her two and one-half year old daughter and her three and one-half year old son, in the same room, the physical and mental condition of the boy he left for dead is surely relevant in determining his "blameworthiness."
>
> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the character of, or the harm imposed, upon the victims.

Tennessee v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990).

This Court, however, need not genuflect before Booth and Gathers. To be sure, the doctrine of stare decisis ought not be disregarded lightly. But this is not a case in which continuing to follow Booth and Gathers would, in the words of Petitioner, "promote[] . . . public confidence in the judiciary and in the authority of constitutional decisions."[4] To the contrary, overruling Booth

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[3] (...continued)
> His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby.

Id.

[4] Petitioner's Brief at 18.

and Gathers would enhance public respect for this Court. Affirming Payne's death sentence would show that this Court will not assert the Constitution as a pretext for overriding the morals and values of the public at large.

The public has spoken through its elected representatives in the United States House of Representatives. The public has spoken through its elected representatives in the United States Senate. The public has spoken through its elected representatives in state legislatures throughout the country. The public's message is loud and clear: the impact on the victim ought to be considered when sentencing a convicted criminal.

This Court can and should, of course, invalidate laws that — while reflecting the popular will — trample on liberties guaranteed by the Constitution. But in a democracy, the proper role of this Court is not that of super-legislature. Nothing in the text of the Eighth Amendment mandated the result in Booth and Gathers. Nothing in prior Eighth Amendment jurisprudence requires judges and juries to pretend that crimes do not have real effects on real people. To the contrary, as this Court has previously recognized, the jury is the "conscience of the community." Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

Nothing in the Eighth Amendment required the jury that sentenced Payne to death to give more credence to a psychologist's testimony that Payne was

"one of the most polite prisoners he had ever interviewed"[5] than to what, at the time of the murder, Payne actually did and to whom. It is not "cruel and unusual punishment" for the jury to reject the argument that an IQ higher than approximately 22 million American citizens constitutes a "mental handicap"[6] which gave Payne a license to kill Charisse Christopher and her young children.

The Eighth Amendment does not require that the deck be stacked in favor of criminals and against their victims. And the Eighth Amendment ought not be used as a pretext for breaking "the link between contemporary community values and the penal system" (Witherspoon, 391 U.S. at 519 n.15) which the jury's sentence of Payne reflected. Booth and Gathers are bad constitutional jurisprudence. It is time that they be reversed.

ARGUMENT

NOTHING IN THE EIGHTH AMENDMENT WARRANTS OVERRIDING THE LEGISLATIVE DETERMINATION THAT VICTIMS HAVE THE RIGHT TO BE HEARD IN THE SENTENCING PROCESS.

The Eighth Amendment, as applied to the States by the Fourteenth Amendment, merely prohibits "cruel and unusual" punishment. It does not permit this Court — in the guise of interpreting the Constitution — to second-

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[5] Petitioner's Brief at 41.

[6] Id.

guess the decisions of individual judges and juries that "certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg v. Georgia, 428 U.S. 153, 184 (1976). Nor should the Eighth Amendment be used as a means of thwarting the will of the people as reflected in the enactments of their elected representatives. Unfortunately, this Court's decisions in Booth and Gathers have done just that.

A. Legislative enactments mandating that victim impact statements be considered in sentencing reflect growing public support for the victims' rights movement.

The Congress of the United States has mandated that the impact of crimes on victims be considered in sentencing those convicted of federal crimes. In the Victim and Witness Protection Act of 1982, P.L. 97-473, Congress, among other things, amended Rule 32(c) of the Federal Rules of Criminal Procedure to require the inclusion of victim impact statements as part of the presentence report prepared in federal criminal cases. The Act also authorizes courts to order restitution. The Senate Judiciary Committee report accompanying the Act noted that "insensitivity and lack of concern for the victim and witness is a tragic failing in our criminal justice system, one which hurts the whole society." S. Rep. 532, 97th Cong., 2d Sess. 10 (1982), reprinted in 1982 U.S. Code Cong. & Admin. News 2515, 2516. Because "[m]any times, especially in cases involving plea bargaining, the

judge must pass sentence on the defendant without ever having seen or heard from the victim, much less having had access to information about the impact the crime had on that victim," Congress viewed "the victim impact statement as a first step to ensure that the victim's side is heard and considered by adjudicative officials." Id., at 12-13; 2518-2519. Congress intended that the Act be construed broadly to require the preparation of a victim impact statement "in all crimes where there is a human victim," including "'indirect' victims such as family members of homicide victims." Id. (emphasis supplied). In other words, Congress intended that a victim impact statement be considered in the precise type of case now before this Court.

Congress returned to victims' rights again in the Comprehensive Crime Control Act of 1984, P.L. 98-473. Titie II, the Sentencing Reform Act of 1984, effected "sweeping reforms" of federal sentencing[2/] that strengthened the position of victims. The Sentencing Reform Act retained the requirement that victim impact statements be included in presentence reports under the new regime of determinant, guideline sentencing. Moreover, the Act also authorizes the imposition of an order of notice to victims.

The Sentencing Reform Act also required the U.S. Sentencing Commission to consider harm to victims in promulgating sentencing guidelines and policy statements. The report of the Senate Judiciary Committee further

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2/ Mistretta v. United States, 488 U.S. 361, 366 (1989).

directed the attention of the Commission to consider "the role that unusual vulnerability of the victim that is known to the defendant should play in the sentencing decision." S. Rep. 225, 98th Cong., 1st Sess. 170 (1983) reprinted in U.S. Code Cong. & Admin. News 3353 (1984). The Sentencing Commission subsequently issued sentencing guidelines and policy statements, which, under 28 U.S.C. § 994(p), are subject to a six month Congressional review period and legislative veto. These sentencing guidelines and policy statements, which Congress allowed to take effect, require courts to consider the harm that the crime causes victims in various ways.[8/] These include a mandatory penalty enhancement for offenses involving a "vulnerable victim."[9/] As a result, victim impact information has taken on a heightened importance under the new sentencing regime.

Also contained in the 1984 comprehensive legislation was the Victims of Crime Act of 1984. That Act, later amended by the Children's Justice and Assistance Act of 1986, established the Crime Victims Fund and provided for victim compensation and assistance. Two years later, in the Anti-Drug Abuse Act of 1988, Congress established the Office for Victims of Crime in the

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[8/] See, U.S.S.G. §§ 3A1.2 (Official Victim), 3A1.3 (Restraint of Victim), 5K2.1 (Death), 5K2.2 (Physical Injury), 5K2.3 (Extreme Psychological Injury), 5K2.4 (Abduction or Unlawful Restraint), 5K2.5 (Property Damage or Loss).

[9/] U.S.S.G. § 3A1.1 (Vulnerable Victim).

Department of Justice. And in the Crime Control Act of 1990, Congress again addressed issues directly concerning the victims of crime in Titles V and II of the Act (the Victims' Rights and Restitution Act of 1990 and the Victims of Child Abuse Act of 1990, respectively).

The foregoing legislative enactments evince the continuing concern of the Congress for the victims of crime. Many of those enactments reflect the recommendations of the Presidential Task Force on Victims of Crime, appointed by President Ronald Reagan in 1981. After holding public hearings in six cities, the Task Force issued a Final Report in 1982. Among its recommendations: "Legislation should be proposed and enacted that would . . . [r]equire victim impact statements at sentencing. . . ." and "Judges should allow for, and give appropriate weight to, input at sentencing from victims of violent crimes."[10/] In support of the Task Force's recommendations, the Final Report noted:

> Victims, no less than defendants, are entitled to their day in court. Victims, no less than defendants, are entitled to have their views considered. A judge cannot evaluate the seriousness of a defendant's conduct without knowing how the crime has burdened the victim. A judge cannot reach an informed determination of the danger posed by a defendant without hearing from the person he has victimized . . .[11/]

[10/] President's Task Force on Victims of Crime, Final Report at 33, 76 (December 1982).

[11/] Id. at 76-77.

The foregoing activities at the federal level have been parallelled by initiatives of state and local governments and private agencies. By 1991, all 50 States had enacted comprehensive victims' rights legislation.[12/] Besides amending state constitutions, these enactments established "Victims' Bills of Rights," funded victim-witness assistance program, entitled crime victims to receive compensation or restitution, protected victims and witnesses from intimidation, allowed victims to participate directly in the criminal justice system through such means as victim impact statements,[13/] and otherwise sought to redress the treatment of crime victims "as appendages of a system appallingly out of balance."[14/]

At the same time, agencies both public and private have been established to provide services to crime victims. Besides helping crime victims enforce their new-found legal rights, such victim service agencies help victims cope with the problems that violent crimes have caused them.[15/] According to the U.S. Justice Department's Office for Victims, there were over 10,000 such victim assistance programs as of March 1991. The establishment of such

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[12/] MADDVOCATE, Spring 1988, "Victim Legislation Update."

[13/] Id.

[14/] Task Force, Final Report at vi.

[15/] Examples include counseling centers for victims of violent crime and their survivors, rape crisis centers, child abuse prevention and treatment centers, domestic violence shelters, and mediators.

victim assistance programs along with the federal and state legislative enactments previously described reflect "an outpouring of popular concern for what has come to be known as victims' rights. . . ." Booth, 482 U.S. at 520 (Scalia, J., dissenting).

B. Booth and Gathers have undermined the legislative accomplishments of the victims' rights movement: personalization and enfranchisement of murder victims and their survivors.

The principal injustice that the victims' rights movement has sought to rectify has been the failure of the criminal justice system to show concern for crime victims as individuals. This failure to "personalize" crime victims was the subject of Justice Blackmun's dissent in Furman v. Georgia, as follows:

> [A]lthough the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of the opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of reference to the victims. . . . Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked.

408 U.S. 238, 413-14 (1972) (Blackmun, J., dissenting) (emphasis supplied).

More recently, in his dissent to Booth, Mr. Justice Scalia properly described one of the objectives underlying the victims' rights movement as being to redress:

> the failure of courts of justice to take into account in their sentencing decisions not only the factors mitigating the defendant's

> moral guilt, but also the amount of harm he has caused to innocent members of society. Many citizens have found one-sided and hence unjust the criminal trial in which a parade of witnesses comes forth to testify to the pressures beyond normal human experience that drove the defendant to commit his crime, with no one to lay before the sentencing authority the full reality of human suffering the defendant has produced — which (and *not* moral guilt alone) is one of the reasons society deems his act worthy of the prescribed penalty.

Booth, 482 U.S. at 520 (Scalia, J., dissenting) (emphasis supplied)

Like the civil rights movement that preceded it, the victims' rights movement has also had as a principal objective the enfranchisement of a class of citizens to whom justice was previously denied. And the parallels with the civil rights movement do not end there. Victims of crime tend to be disproportionately black, disproportionately poor, and disproportionately young. For example, the murder victimization rate for blacks is six times that of whites, and blacks also experience higher rates of rape, robbery, and aggravated assault.[16/] So, too, victimization rates for teenagers and young adults, for households with less than $7,500 annual income, and for persons living in inner cities are among the highest for any demographic groups.[17/]

The victim impact statement legislation invalidated by Booth and Gathers represented a good faith attempt to balance protection of defendants' rights

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[16/] U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Violent Crime in the United States, 7 (March 1991).

[17/] Id. at 8.

with personalization and enfranchisement of crime victims. Yet with the stroke of a pen, a plurality of Justices of this Court — first in Booth and then in Gathers — has upset the legislative balance. In lieu of the legislative judgment that victims deserve to be heard, this Court has depersonalized and disenfranchised murder victims and their survivors.

While proceeding to depersonalize murder victims in Booth, this Court characterized defendants as "uniquely individual human being[s] "(482 U.S. at 504) — thereby implicitly suggesting that their victims are something less. In startling contrast, the plurality held that information about murder victims as uniquely individual human beings was "irrelevant." Id. at 504-05. Going further, the plurality held that mere references to victims, as persons, must be condemned because they might "divert . . . attention" from the victims' killers. See id. at 505.

Besides depersonalizing murder victims, the Booth and Gathers plurality disenfranchised their survivors. Through the legislative process, survivors had secured the right to participate in the criminal justice system. Through the legislative process, survivors of murder victims had secured the right to tell the sentencing judge and jury the effect of losing their loved ones. By judicial fiat, this Court has told survivors they have no right to be heard. By judicial fiat, this Court has disenfranchised the survivors of murder victims.

This Court's condemnation of the legislative majority's preference for victim impact statements finds no support in the Eighth Amendment or any

other provision of the Constitution. In a democracy, those whose values command a legislative majority are entitled to have their values reflected in the law so long as majority rule does not impinge upon individual rights guaranteed by the Constitution.

C. The Eighth Amendment is supposed to reflect "contemporary values" rather than be used as a pretext for imposing values different from those expressed through the democratic process.

The text of the Eighth Amendment itself provides no basis for concluding that consideration of the impact of the crime on the victim converts an otherwise valid sentence into unconstitutional "cruel and unusual" punishment. This Court has already decided that the death penalty itself "does not invariably violate" the Eighth Amendment. Gregg, 428 U.S. at 169. The rationale for this Court's decision in Gregg demonstrates the fallacy of the argument that consideration of victim impact statements in the sentencing process is somehow "cruel and unusual." In Gregg, this Court quoted Mr. Chief Justice Warren's observation that the Eighth Amendment "'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" 428 U.S. at 173, quoting Trop v. Dulles, 356 U.S. 86, 101 (1958). This Court's determination of whether considering the impact of the crime on the victim as part of the sentencing process reflects the "contemporary values . . . relevant to the application of the Eighth Amendment . . . does not call for a subjective judgment." Id. Rather, the

Court must "look to objective indicia that reflect the public attitude toward" victim impact statements. Id.

The best "objective indicia" of the "public attitude" toward victim impact statements are the numerous pieces of legislation that mandate their use in sentencing. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 294-95 (1976) ("legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency."). In interpreting the Eighth Amendment, the Members of this Court "may not act as judges as [they] might as legislators." Gregg, 428 U.S. at 175. "[I]n assessing [the victim impact statement] against the constitutional measure, [the Members of this Court] presume its validity." Id. (emphasis supplied). "[A] heavy burden rests on those who would attack the judgment of the representatives of the people." Id. The victim impact statement legislation enacted by Congress and other legislative bodies reflects the fact that "'in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'" Id., quoting Furman v. Georgia, 408 U.S. 238, 383 (Burger, C.J., dissenting).

This Court's decisions in Booth and Gathers have had the pernicious effect of making this Court, "'under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.'" Gregg, 428 U.S. at 176, quoting Powell v. Texas, 392 U.S. 514, 533 (1968). As a result of this Court's

decisions in Booth and Gathers, "[t]he ability of the people to express their preference [for victim impact statements] through the normal democratic processes, as well as through ballot referenda, is shut off." Id. This Court's denial of victims' rights — and of the right to vote for legislation to protect victims' rights — finds no support in the Eighth Amendment's prohibition of cruel and unusual punishment.

D. This Court's decisions in Booth and Gathers represent aberrations in Eighth Amendment jurisprudence.

The notion that the Eighth Amendment prohibits victim impact evidence does not "follow logically from the Court's earlier decisions," as stated in Petitioner's Brief at 21 et seq. To the contrary, Booth and Gathers are aberrations that find no support in prior Eighth Amendment decisions, much less the text of the Constitution itself. The case now before this court illustrates that the practical effect of Booth and Gathers is to "indirectly outlaw [] capital punishment by placing totally unrealistic conditions on its use." Gregg, 428 U.S. at 199 n.50. This Court has declared that information about the victim is "irrelevant" and constitutionally barred from consideration in capital cases. Booth, 482 U.S. at 504-05. As a result of this Court's decisions in Booth and Gathers, there is only one practical way of ensuring that death sentences are not overturned on Eighth Amendment grounds. That is to turn the victim into a "faceless stranger at the penalty phase of a capital trial." Gathers, 490 U.S. at 821 (O'Connor, J., dissenting). Such an absurd

and unjust result does not "follow logically" from either the Eighth Amendment or prior cases construing it.

When this Court rejected the argument that the death penalty itself is "cruel and unusual," it noted that sentencing guidelines such as those contained in the Model Penal Code reduce the risk that a judge or jury "will impose a sentence that fairly can be called capricious or arbitrary." Gregg, 428 U.S. at 194-95. The MPC guidelines which this Court cited with approval in Gregg provide that among the "aggravating circumstances" are that "[t]he murder was especially heinous, atrocious or cruel, manifesting exceptional depravity." See id. at 193-94 n.44. The sentencing judge or jury needs to know the effect upon the victim to determine whether "[t]he murder was especially heinous, atrocious or cruel, manifesting exceptional depravity"? As this Court noted in Gregg, the foregoing standard has been interpreted by the Supreme Court of Florida to mean a "'conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" Id. at 201 n.52, quoting State v. Dixon, 283 So.2d 1, 9 (1973). (emphasis supplied). In this case, the jury was entitled to know what effect Payne had on three and a half year old Nicholas Christopher. The jury was entitled to know what effect it had on Christopher to watch Payne rape his mother before stabbing her to death, and to watch Payne stab his two and a half year old sister to death before Payne stabbed him and left him for dead. If such information is suppressed, the jury cannot make an informed decision whether Payne committed a "conscienceless

or pitiless crime." Nor can the jury make an informed decision whether Payne was "unnecessarily torturous to the victim."

In Gregg, this Court recognized that a legitimate function of "capital punishment is an expression of society's moral outrage at particularly offensive conduct." 428 U.S. at 183. The jury that sentenced Payne is entitled under the Eighth Amendment to express its "moral outrage" about the effect of his crime perpetrated against a young mother and her defenseless children. But according to Petitioner's Brief (see p. 32):

> The essential lesson of Booth and Gathers is that the brutal, cold blooded murder of a lonely prostitute is every bit as heinous as the similar killing of a hard working, loving mother.

Nothing in the Eighth Amendment requires sentencing judges and juries to ignore the fact that Payne left three and a half year old Nicholas Christopher an orphan after intending to kill him. The identity of Payne's victims, and the effect of his crimes on them, are "circumstances of the offense"[18] which the jury is entitled to consider in deciding whether to impose the death penalty. To decide whether the death penalty is "proportional" to the crime,[19] the jury needs to know what impact the crime has had. Only then can the jury express the "conscience of the community" (Witherspoon, 391 U.S. at 519)

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[18] Woodson, 428 U.S. at 303-04.

[19] See, e.g., Weems v. United States, 217 U.S. 349 (1910); Coker v. Georgia, 433 U.S. 584 (1977).

as to whether the circumstances of the crime make it "so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg, 428 U.S. at 184.

The effect of Booth and Gathers is to focus the sentencing hearing exclusively on "the defendant's background and record." Booth, 482 U.S. at 505. This Court's precedents give defendants considerable latitude to argue that "mitigating circumstances" weigh against imposing the death penalty. See, e.g., Eddings v. Oklahoma, 455 U.S. 104 (1982). In this case, the "mitigating evidence" that Payne was allowed to offer at sentencing had nothing to do with either the "circumstances of the crime"[20] or Payne's "personal responsibility and moral guilt."[21] The jury heard from Payne's parents, whose testimony that he was "a good son" (791 S.W.2d at 17) was hardly surprising. The jury also heard from a member of Payne's church, who testified that "it was inconsistent with Defendant's character to have committed these crimes." Id. And the jury heard from a clinical psychologist "who specializes in criminal court evaluation work" (presumably not on a pro bono basis). Id. According to the psychologist, Payne's IQ made him "mentally handicapped."

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[20] Zant v. Stephens, 462 U.S. 862, 879 (1983).

[21] Enmund v. Florida, 458 U.S. 782, 801 (1982).

3.125[22] The psychologist also "described Defendant as 'somewhat naive' and one of the most polite individuals he had interviewed in jail." Id.

Under Booth and Gathers, according to Petitioner, the prosecution can no longer offer evidence of aggravating circumstances to counter "mitigating evidence" such as that offered by Payne in this case. Instead, the Eighth Amendment limits the prosecution, according to Petitioner, to "the cross-examination of defense witnesses, the introduction of its own proof bearing on relevant factors, and the use of appropriate arguments." Petitioner's Brief at 39-40. In other words, the prosecution in this case should have confined its efforts at the sentencing hearing to cross-examining Payne's parents about the factual basis for their testimony that he was a "good son." Alternatively, the prosecution could have sought testimony from others who disagreed with the psychologist's characterization of Payne as "polite."

Nothing in the Eighth Amendment requires the deck to be stacked against murder victims and their survivors. To the contrary, the effect of Booth and Gathers is to withhold relevant evidence which, under the Eighth Amendment, must be considered. Cf. Eddings v. Oklahoma, 455 U.S. 104

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[22] The psychologist testified that Payne had a Verbal IQ of 78 and a Performance IQ of 82. An IQ of 80 would place Payne in the 8.8 percentile. Fancher, R.E., The Intelligence Men, 154 (1985). According to the U.S. Bureau of the Census, the total U.S. population in 1990 was 248,709,873. Therefore approximately 22 million Americans share Payne's "mental handicap" and, by Petitioner's reasoning, ought to be exempt from capital punishment.

(1982). Booth and Gathers prevent the sentencing judge and jury from considering that "the victim is an individual whose death represents a unique loss to society and in particular to his family." Booth, 482 U.S. at 517 (White, J., dissenting).

E. Overruling Booth and Gathers would promote stability and enhance public respect for this Court and the rule of law.

This Court's arbitrary decision that victim impact evidence is unconstitutional has troubling implications for public respect for this Court in particular and the rule of law generally:

> When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy — of self-help, vigilante justice, and lynch law.

Furman v. Georgia, 408 U.S. at 308 (Stewart, J., concurring). By overruling Booth and Gathers, this Court will do more than reopen the courthouse doors that have been barred to crime victims and their families. Overruling Booth and Gathers will also promote "the stability of a society governed by law." Id. It is this Court's decisions in Booth and Gathers that represent the "mere exercise of judicial will, with arbitrary and unpredictable results." Thornburg v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 786-87 (1986) (White, J., dissenting). Therefore, the rationale for the doctrine of stare decisis is best served in this case by departing from the doctrine and instead overruling Booth and Gathers.

CONCLUSION

Mr. Justice Scalia, dissenting in Gathers, characterized Booth as "a plainly unjustified intrusion upon the democratic process." 490 U.S. at 825. This precisely sums up the position of amici.

And as that same dissenting opinion pointed out, "'it is the Constitution which [each Justice] swore to support and defend, not the gloss which his predecessors may have put on it.'" Id., quoting Douglas, Stare Decisis, 49 Colum. L. Rev. 735, 736 (1949). In this case, the result which is most faithful to the Constitution, and to the rule of law, is for this Court to overrule Booth and Gathers while affirming the Supreme Court of Tennessee.

Respectfully submitted,

Frank G. Carrington
4530 Oceanfront Avenue
Virginia Beach, Virginia 23451
Telephone: 804/422-2692

Michael J. Lockerby
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: 804/788-8200

David E. Anderson
U.S. House of Representatives
Committee on the District of Columbia
Room 1310, Longworth House Office Building
Washington, D.C. 20515
Telephone: 202/225-7158

Counsel for Amici Curiae